UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE CARTOON NETWORK LP, LLLP and CABLE NEWS NETWORK LP, LLLP,

Plaintiffs/Counterclaim Defendants,

v.

CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORPORATION,

Defendants/Counterclaim Plaintiffs/ Third-Party Plaintiffs,

v.

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP, LLLP, and THE CARTOON NETWORK LP, LLP,

Third-Party Defendants.

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06 Civ. 4092 (DC)

STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1(a) IN SUPPORT OF TURNER'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to Rule 56.1(a) of the Local Rules of the United States District Court for the Southern District of New York, Plaintiffs and Counterclaim Defendants The Cartoon Network LP, LLLP and Cable News Network LP, LLLP and Third-Party Defendants Turner Broadcasting System, Inc., Turner Network Sales, Inc., Turner Classic Movies LP, LLLP and Turner Network Television LP, LLLP (collectively the "Turner Entities") contend that there is no genuine issue to be tried with respect to the following material facts:

I. The Parties

1. Plaintiff and Counterclaim Defendant The Cartoon Network LP, LLLP ("The Cartoon Network") is a Delaware Limited Liability Limited Partnership with its principal place of business in Atlanta, Georgia. The Cartoon Network produces, creates and licenses, among other things, a network of programming distributed in the United States as the Cartoon Network, consisting of animated programming and non-animated programming related to animated topics. (Compl. ¶ 12.)[1]

2. Plaintiff and Counterclaim Defendant Cable News Network LP, LLLP ("CNN") is a Delaware Limited Liability Limited Partnership with its principal place of business in Atlanta, Georgia. CNN produces, creates and licenses, among other things, several networks of programming distributed in the United States including CNN, Headline News, and CNN en Español, consisting of national and international news, sports programming, finance news, weather reports and features. (Compl. ¶¶ 2, 13.)

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[1] References herein in the form "Compl. ¶" are to the Complaint in Case 06 Civ. 4092, dated May 26, 2006. References herein in the form "Answer ¶" are to Cablevision's Answer to Complaint, Counterclaim, and Third Party Claim, dated June 19, 2006. References herein in the form "Reply ¶" are to the Turner Entities' Reply to Counterclaims and Answer to Third-Party Complaint, dated July 10, 2006.

3. Third-Party Defendant Turner Broadcasting System, Inc. is a Georgia corporation with its principal place of business in Atlanta, Georgia. Turner Broadcasting System, Inc. is the direct or indirect parent of The Cartoon Network, CNN, Turner Classic Movies LP, LLLP, and Turner Network Television LP, LLLP and Turner Network Sales, Inc. Turner Broadcasting System, Inc., among other things, also licenses a network of programming distributed in the United States as TBS and authorizes distribution of WTBS within the Atlanta designated market. (Reply ¶¶ 53, 55.)

4. Third-Party Defendant Turner Network Sales, Inc. is a Georgia corporation with its principal place of business in Atlanta, Georgia. Among other things, Turner Network Sales, Inc. licenses certain programming on the Turner networks as network programming and in other media. (Reply ¶ 55.)

5. Third-Party Defendant Turner Classic Movies LP, LLLP (as Turner Classic Movies, L.P., LLLP is formally known) is a Delaware Limited Liability Limited Partnership with its principal place of business in Atlanta, Georgia. Among other things, Turner Classic Movies LP, LLLP produces, creates and licenses a network of programming distributed in the United States as Turner Classic Movies. (Reply ¶ 56.)

6. Third-Party Defendant Turner Network Television LP, LLLP is a Delaware Limited Liability Limited Partnership with its principal place of business in Atlanta, Georgia. Among other things, Turner Network Television LP, LLLP produces, creates and licenses a network of programming distributed in the United States as Turner Network Television consisting of movies, dramatic shows, situation comedies, game shows and live professional sports. (Reply ¶ 57.)

7. CNN owns the copyrights to a large amount of programming including individual episodes of popular programs such as *Larry King Live*, *Anderson Cooper 360°* and *Lou Dobbs Tonight*. (Copyright Registrations (tab 7).)

8. The Cartoon Network owns the copyrights to a large amount of programming including individual episodes of popular programs such as *Codename: Kids Next Door*, *Camp Lazlo* and *Aqua Teen Hunger Force*. (Copyright Registrations (tab 8).)

9. The Turner Entities license their programming for transmission as linear networks to all major cable operators, including Cablevision, as well as to direct broadcast satellite companies such as DirecTV and EchoStar (the Dish Network). (Channel Lineups (tab 9).)

10. The Turner Entities license certain programming to cable operators for video-on-demand ("VOD") use. For example, certain of the Turner Entities have licensed Comcast to provide VOD programming branded in association with many of the Turner networks, including the Cartoon Network, Adult Swim (a separately branded programming block on the Cartoon Network), and CNN. (Materials from www.comcast.com (tab 10); TURNER 00022960-00022974 (tab 11) at TURNER 00022967, TURNER 00022969; TURNER 00012444-00012451 (tab 12) at TURNER 00012445.)

11. CNN and The Cartoon Network derive substantial economic benefits from licensing copyrighted programming for VOD use. (TURNER 00001288-00001321, TURNER 00001269-00001286 (tab 13) at TURNER 00001282, TURNER 00001292, TURNER 00001298, TURNER 00001300.)

12. CNN and The Cartoon Network license some of their copyrighted programming for sale on DVD. (Materials from www.amazon.com (tabs 14, 15).)

13. CNN also makes certain programming available on the CNN.com website (http://www.cnn.com). (Materials from www.cnn.com (tab 16).)

14. The Cartoon Network makes certain programming available on the Cartoon Network website (htpp://www.cartoonnetwork.com) and the Adult Swim website (http://www.adultswim.com). (Materials from www.cartoonnetwork.com (tab 17); Materials from www.adultswim.com (tab 18).)

15. CNN makes certain programming available on its "CNN Pipeline" website (http://edition.cnn.com/pipeline/). A subscriber to CNN Pipeline can view programming either by selecting one of four live feeds that stream 24 hours a day or, alternatively, by selecting an individual news story. CNN generates revenues from daily, monthly and annual subscription fees for CNN Pipeline. The current subscription fees are $.99 per day, $2.95 per month or $24.95 per year. (Materials from www.cnn.com/pipeline (tab 19).)

16. In July 2006, The Cartoon Network, in conjunction with VIZ media, launched a new website called Toonami Jetstream (http://www.ToonamiJetstream.com). On the Toonami Jetstream website, The Cartoon Network makes episodes of its copyrighted programming from the "Toonami" time-block, including episodes of the award-winning cartoon *Samurai Jack*, available for viewing. (Materials from www.toonamijetstream.com (tab 20); Press Release dated April 25, 2006 (tab 21).)

17. CNN and The Cartoon Network have licensed selected programming for download on Apple's iTunes. (Byko Tr. (tab 3) at 148:22-149:9.) For example, episodes from selected seasons of the Cartoon Network's *Johnny Bravo*, of Adult Swim's cartoons *Aqua Teen Hunger Force*, *The Venture Bros.* and *Sealab 2021*, and selected programming from CNN's documentary series *CNN Presents* can be downloaded for $1.99 per episode. (Materials from

www.itunes.com (tab 22); Press Release dated August 1, 2006 (tab 23).) CNN and The Cartoon Network make additional programming available on iTunes for free. (Press Release dated August 1, 2006 (tab 23).)

18. CNN and The Cartoon Network license certain copyrighted programming to cellular phone providers. (Byko Tr. (tab 3) at 148:22-149:9.) Certain subscribers to Cingular's phone service can pay a monthly fee to receive video downloads of programming from several television networks, including CNN and the Cartoon Network. (Materials from www.cingular.com (tab 24).)

19. The Turner Entities are constantly exploring novel and technologically advanced methods of licensing their copyrighted works or otherwise exploiting their value. (Byko Tr. (tab 3) at 148:22-149:9.)

20. Defendants CSC Holdings, Inc. and Cablevision Systems Corporation (collectively "Cablevision") are Delaware corporations, each with its principal place of business in Bethpage, New York. Defendant Cablevision Systems Corporation is a publicly traded company, whose holdings include all of the outstanding stock of Defendant CSC Holdings, Inc. (Compl. ¶ 14; Answer ¶ 14.)

21. Cablevision is a large cable operator with approximately three million subscribers in and around the New York City metropolitan area. (Compl. ¶ 15; Answer ¶ 15.)

22. Cablevision carries a number of Turner's linear networks including the Cartoon Network, CNN, Headline News, and CNN en Español. (Answer ¶¶ 54, 56-58.)

23. Video-on-demand ("VOD") programming is programming delivered by a cable service operator at a time chosen by the subscriber. (Compl. ¶ 17; Answer ¶ 17.)

24. Cablevision offers certain programming on an on demand, or video-on-demand basis. (Budill Tr. (tab 2) at 25:14-26:10.)

25. Cablevision offers VOD programming to its subscribers on several bases, including pay-per-view VOD, "free" VOD (in which subscribers pay nothing beyond the regular monthly cable bill) and subscription VOD ("SVOD"), in which subscribers pay a monthly fee for access to certain content. (Compl. ¶ 17; Answer ¶ 17; Budill Tr. (tab 2) at 31:17-34:6.)

II. The Contractual Relationship Between Cablevision and Programmers

26. Cablevision regularly obtains licenses from programming providers for the right to transmit their programming as a linear network. (Budill Tr. (tab 2) at 20:19-21:19.)

27. An "affiliation agreement" is a contract "between a content provider and a distributor of that content, the terms of which govern the rights and obligations of each party vis-à-vis the distribution of that content". (Budill Tr. (tab 2) at 9:19-10:19.)

28. Certain of the Turner Entities have entered into affiliation agreements with Cablevision for the right to transmit the linear network feed for the CNN network, Headline News, and CNN en Español, all of which are owned and operated by CNN, and the linear broadcast feed for the Cartoon Network, which is owned and operated by The Cartoon Network. (Compl. ¶¶ 12, 13; Answer ¶¶ 12, 13.)

29. Cablevision does not distribute any programming belonging to a Turner Entity, including The Cartoon Network or CNN, as part of its regular cable television broadcast in the absence of a license. (Budill Tr. (tab 2) at 23:5-13.)

30. The Cartoon Network entered into a licensing agreement with Cablevision Systems Corporation and several Cablevision affiliates on August 30, 1992 (the "Cartoon Network Affiliation Agreement" (tab 25)).

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34. CNN entered into a licensing agreement with CSC Holdings, Inc. and several Cablevision affiliates in December 1992 (the "CNN Affiliation Agreement" (tab 26)).

35.

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37.

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38. Cablevision has entered into licensing agreements with a number of programming providers for the right to transmit programming as VOD. (Budill Tr. (tab 2) at 48:8-49:17.)

39. There is no instance in which Cablevision transmits VOD programming without "some form of agreement either written or oral" from the programming provider for the right to transmit that programming. (Budill Tr. (tab 2) at 25:3-27:23, 35:25-36:18, 40:18-41:12, 48:8-49:17.)

40. Cablevision's licensing agreements for VOD programming contain standard terms pertaining to Cablevision's right to use the programming

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41. Cablevision benefits from its ability to transmit VOD programming to its subscribers. Cablevision generates revenue from fees it charges its subscribers for certain VOD programming. (Budill Tr. (tab 2) at 31:17-24.) Additionally, the ability to offer VOD programming helps Cablevision to attract or retain subscribers because direct broadcast satellite companies cannot offer VOD programming. (Budill Tr. (tab 2) at 35:4-24, 37:6-38:7.)

42. Cablevision does not have an agreement with any of the Turner Entities for the right to provide any programming on the Turner Networks as VOD. (Budill Tr. (tab 2) at 49:18-22; Answer ¶ 18.)

43. Cablevision has not obtained any license or authorization from any programming provider for the right to reproduce, distribute, or transmit programming as part of its RS-DVR Service. (Budill Tr. (tab 2) at 51:7-53:11, 75:1-76:3.)

III. How Cablevision Transmits Linear Networks and VOD Programming

44. A linear network feed is programming that is continuously streamed to cable television subscribers. (Compl. ¶ 4; Answer ¶ 4; DeHart Tr. (tab 4) at 31:13-15.)

45. Cablevision receives its linear network feeds and VOD programming at a head-end. A "head-end" is a term used to describe "the point at which all programming is collected and formatted for placement on the cable system". (Walter Ciciora et al., *Modern Cable Television Technology* (tab 27) 1011 (2d ed. 2004).)

46. The Turner Entities send their linear network feeds to Cablevision via satellite. (Compl. ¶ 4; Answer ¶ 4; DeHart Tr. (tab 4) at 18:4-19.)

47. Cablevision transmits linear network feeds over cable lines to its subscribers. (Compl. ¶ 3; Answer ¶ 3.)

48. Cablevision does not make a copy of the programming it receives for transmission as a linear network in the course of delivering linear network feeds to its

subscribers as part of its normal cable television service. (The Cartoon Network Affiliation Agreement (tab 25) ¶ 4C; The CNN Affiliation Agreement (tab 26) ¶ 4C.)

49. The same cable transmission goes to all subscribers in a logical geographic group called a "node". (Mitchko Tr. (tab 6) at 85:15-25, 198:25-199:17.)

50. The same signal is transmitted to all subscribers in the node, but the signal can only be viewed by a subscriber on his or her television if that subscriber's set-top box has the correct access information. (Mitchko Tr. (tab 6) at 38:13-21; Walter Ciciora et al., *Modern Cable Television Technology* (tab 27) 388 (2d ed. 2004).)

51. VOD programming is transmitted to cable operators such as Cablevision on a periodic (generally weekly) basis in a non-linear form. (DeHart Tr. (tab 4) at 89:18-90:7.)

52. VOD programming is stored at the head-end as digital files. (Blattman Ex. 4 (tab 28) at Arroyo 000410; Mitchko Tr. (tab 6) at 355:5-23; CSC009271-286 (tab 29) at CSC009279-80.)

53. A "bit rate" is the number of bits of data transmitted per second. (Walter Ciciora et al., *Modern Cable Television Technology* (tab 27) 1000 (2d ed. 2004).)

54. Cablevision receives and stores VOD programming at a constant bit rate rather than a variable bit rate. (Mitchko Tr. (tab 6) at 231:22-25.)

55. VOD programming must be at a constant bit rate so that the cable operator can accurately determine the disk space required for storage of that programming and the bandwidth required for streaming that programming. (Blattman Tr. (tab 1) at 144:22-145:5, 194:25-195:19; Walter Ciciora et al., *Modern Cable Television Technology* (tab 27) 390 (2d ed. 2004).)

56. When the Turner Entities provide programming to cable operators to use as VOD, they convert the programming to a constant bit rate before sending it to the cable operator. (DeHart Tr. (tab 4) at 87:23-90:12.)

57. Cablevision transmits all programming over radio frequency bandwidth. There is a finite amount of bandwidth available, and Cablevision dedicates portions of the total bandwidth to different services it provides. For example, Cablevision dedicates portions of bandwidth to normal cable television service, to VOD, and to the RS-DVR Service. (Mitchko Tr. (tab 6) at 80:23-81:9, 346:2-347:15; CSC002936-941 (tab 30) at CSC002937-939.)

58. When a subscriber orders VOD programming, the cable operator locates the programming on a server at its head-end and transmits that programming over a particular bandwidth. (DeHart Tr. (tab 4) at 35:15-37:22; CSC009271-CSC009286 (tab 29) at CSC009279-280.)

59. When a subscriber requests VOD programming, that programming is transmitted to everyone in the node where that subscriber resides. (Mitchko Tr. (tab 6) at 38:13-23; Walter Ciciora et al., *Modern Cable Television Technology* (tab 27) 388 (2d ed. 2004).)

60. Because bandwidth is limited, only a given number of subscribers in a node can view VOD programming at any one time. If too many subscribers request VOD programming at a time, some will receive an error or "please try again" message. (Mitchko Tr. (tab 6) at 342:5-343:17.)

IV. Digital Video Recorders

61. A DVR is a stand-alone device that allows consumers to copy and store recorded programming for viewing at a later time on a hard drive contained within the device. Unlike a VCR, which makes analog copies on a videocassette, a DVR makes digital copies on a

hard drive contained within the device. (*Dictionary of Video and Television Technology* (tab 31) 87 (2002).)

62. In 1999 a device branded as TiVo became the first commercially available DVR. (Answer ¶ 63.)

63. The user directs the DVR to record programming, which can come from a linear network feed or from another source. (Mitchko Tr. (tab 6) at 20:25-23:9; Gottesman Ex. 4 (tab 32) at CSC011909.)

64. With a DVR, recording, storage, and playback of programming is considered "local to the box", because the hard drive where programming is recorded, stored, and played back from is inside the device itself. (DeHart Tr. (tab 4) at 107:21-108:15; Mitchko Ex. 31 (tab 33) at CSC000199.)

65. With a DVR, the user plays back programming from the internal hard drive, and that programming is displayed on the user's television. (Mitchko Tr. (tab 6) at 343:21-344:12.)

66. A set-top DVR is "a DVR embedded in a set-top [cable box] that is provided to a consumer by a cable operator". It is a "stand-alone device" in the subscriber's home. (DeHart Tr. (tab 4) at 76:7-18.)

67. Cablevision has made set-top DVRs available to its subscribers since 2004. (Gottesman Tr. (tab 5) at 12:9-20.)

V. Cablevision's "RS-DVR" Service

68. Cablevision has recently announced that it intends to launch a new service, which it calls a Remote-Storage Digital Video Recorder ("RS-DVR"), which it will make available to its subscribers (the "RS-DVR Service"). (Budill Ex. 4 (tab 34); Answer ¶ 71.)

69. Cablevision intends to charge its subscribers an additional fee for the RS-DVR Service. (Answer ¶ 22; Gottesman Tr. (tab 5) at 124:14-25.)

70. Cablevision will benefit financially if the RS-DVR Service is made available to its subscribers. (Gottesman Tr. (tab 5) at 56:22-57:11.)

71. Cablevision believes that the ability to offer the RS-DVR Service will help Cablevision to attract or retain subscribers because direct broadcast satellite companies cannot offer an RS-DVR Service. (Gottesman Tr. (tab 5) at 60:21-62:17.)

72. The RS-DVR Service is "developed and ready for implementation". (Answer ¶ 7.)

73. Cablevision designed and built the RS-DVR Service. (Mitchko Tr. (tab 6) at 207:25-209:19, 234:10-23; Mitchko Ex. 17 (tab 35) at CSC001445.)

74. Cablevision can decide which linear networks it wants to make available as part of the RS-DVR Service. (Mitchko Tr. (tab 6) at 56:6-57:11; Mitchko Ex. 25 (tab 36) at CSC002974.)

75. At one point, Cablevision planned to only make 50 linear networks available to RS-DVR Service technical trial participants. (Mitchko Ex. 36 (tab 37) at CSC000004; CSC009997-10045 (tab 38) at CSC010001.) Cablevision also considered allowing only 5 or 12 linear networks to be recorded as part of the RS-DVR Service technical trial. (CSC009747-753 (tab 40) at CSC009748; CSC000733-742 (tab 41) at CSC000735.)

76. Cablevision did not plan to make high definition channels, music channels or pay-per-view available for the RS-DVR Service technical trial. (Mitchko Tr. (tab 6) at 56:6-14; Mitchko Ex. 36 (tab 37) at CSC000006; Mitchko Ex. 37 (tab 42) at CSC000041.)

77. Cablevision, and not Cablevision's subscribers, will maintain a database of every request by an RS-DVR Service subscriber; this database will be accessible by a Cablevision system administrator, but not by Cablevision subscribers. (Mitchko Tr. (tab 6) at 31:10-34:21.)

78. Cablevision, and not Cablevision's subscribers, have control over the software that controls the duplication and storage duplication of programming as part of the RS-DVR Service. (Mitchko Tr. (tab 6) at 50:8-51:5.)

79. Cablevision intends to provide customer service for the RS-DVR Service. (CSC003031-032 (tab 43) at CSC003032; CSC003128 (tab 44).)

80. Cablevision intends to market the RS-DVR Service. (Gottesman Tr. (tab 5) at 44:18-24.)

81. Servers located at Cablevision's head-end and the software that runs on those servers are necessary for copying and transmitting programming as part of the RS-DVR Service. (Blattman Tr. (tab 1) at 191:23-193:4.)

82. Cablevision has purchased the hardware for the RS-DVR Service. (Blattman Tr. (tab 1) at 188:17-189:4; Mitchko Ex. 17 (tab 35) at CSC001453; Mitchko Ex. 33 (tab 45) at CSC000773; CSC007463 (tab 47).)

83. Cablevision has licensed the necessary software for the RS-DVR Service, some of which was written at Cablevision's request specifically for the Service. (Blattman Tr. (tab 1) at 189:5-191:22; CSC001256 (tab 46); Mitchko Ex. 17 (tab 35) at CSC001453; Mitchko Ex. 33 (tab 45) at CSC000773.)

84. All of the hardware components of the RS-DVR Service that ingest, copy, store and transmit programming are located in a Cablevision facility in Hicksville, NY. (Mitchko Tr. (tab 6) at 233:15-235:14; Mitchko Tr. (tab 6) at 248:23-250:8.)

A. How Cablevision Obtains Programming for the "RS-DVR Service"

85. Cablevision makes programming available for the RS-DVR Service by sending it from a component of Cablevision's cable system manufactured by BarcoNet that distributes linear networks for normal cable television service. (Mitchko Ex. 4 (tab 48); Mitchko Ex. 40 (tab 49) at CSC000022; Mitchko Tr. (tab 6) at 52:7-53:9.) This is the "source of all the [programming] content" for the RS-DVR Service. (Mitchko Tr. (tab 6) at 52:17-20.)

86. As part of the RS-DVR Service, Cablevision splits the stream of programming containing the linear network feeds that it receives from programming providers into two separate streams of programming. Cablevision transmits one stream containing the linear network feeds for normal cable television service directly to Cablevision subscribers and transmits another stream containing the same linear network feeds into the system for the RS-DVR Service. (Mitchko Tr. (tab 6) at 52:2-53:9; Defendants' Responses to Plaintiffs' First Set of Interrogatories (tab 39) at 5 incorporating ¶ 48 of Defendants' Proposed Stipulated Facts and the definition of "Aggregated Programming Stream" from ¶ 23[2] (tab 50).)

87. Most linear network feeds arrive at Cablevision at a variable bit rate. (Mitchko Tr. (tab 6) at 231:18-21.) In order for the RS-DVR Service to process the streams "the data must be converted to a constant bit rate". (Mitchko Ex. 40 (tab 49) at CSC000022.)

[2] The Turner Entities do not adopt Defendants' Proposed Stipulated Facts as a whole, rather the Turner Entities state only that there is no dispute with respect to those material facts specifically identified by paragraph or clause in this document, and that insofar as those paragraphs are incorporated by reference in Defendants' Responses to Plaintiffs' First Set of Interrogatories they are admissions.

88. Cablevision directs the linear network feeds for all the networks it chooses to make available as part of the RS-DVR Service, regardless of whether there has been a request for that programming, through a piece of equipment called a "clamper" manufactured by, and purchased from, BigBand Networks, Inc. (the "clamper"). (Mitchko Ex. 4 (tab 48); Mitchko Ex. 40 (tab 49) at CSC000022; Mitchko Tr. (tab 6) at 53:10-55:13, 57:12-17.)

89. Cablevision uses the clamper to convert the feeds for each linear network it chooses to make available as part of the RS-DVR Service from a variable bit rate to a constant bit rate and from a multi-program transport stream to a single-program transport stream. (Mitchko Ex. 4 (tab 48); Mitchko Ex. 40 (tab 49) at CSC000022.)

90. As Cablevision streams linear network feeds through the clamper, packets of digital data from the linear network feeds are duplicated in the clamper and stored in a buffer (the "clamping buffer") in order to facilitate the conversion of the linear network feed from a variable bit rate to a constant bit rate. (Blattman Ex. 29 (tab 51) at Arroyo 002408; Walter Ciciora et al., *Modern Cable Television Technology* (tab 27) 389-90 (2d ed. 2004).)

91. Programming for the RS-DVR Service must be at a constant bit rate so that Cablevision can accurately determine the disk space required for storage of that programming and the bandwidth required for transmitting that programming. (Blattman Tr. (tab 1) at 144:15-146:8.)

92. Cablevision has purchased servers manufactured by Arroyo Video Solutions, Inc. ("Arroyo"), with software licensed from Arroyo (the "Arroyo server"), to ingest, copy, store, and transmit programming in the RS-DVR Service. (Mitchko Ex. 4 (tab 48); Blattman Tr. (tab 1) at 65:8-16, 188:17-191:22; Mitchko Tr. (tab 6) at 69:11-70:4.)

93. As part of the RS-DVR Service, Cablevision directs the "clamped" programming streams from the clamper to the Arroyo server with the use of a switch manufactured by and purchased from Ciena Corporation. (Mitchko Ex. 4 (tab 48); Mitchko Tr. (tab 6) at 57:18-25.)

94. Cablevision directs programming streams for all of the linear networks that Cablevision chooses to make available as part of the RS-DVR Service to the Arroyo server. (Blattman Tr. (tab 1) at 146:9-20.)

B. How Cablevision Copies Programming in the "RS-DVR" Service

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96. Cablevision copies each programming stream into the primary ingestion buffer only once, regardless of how many subscribers have requested copies. (Mitchko Tr. (tab 6) at 316:17-318:2.)

97. **REDACTED**

98.

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99. REDACTED

100. REDACTED

101. REDACTED

102. REDACTED

103. As part of the RS-DVR Service, Cablevision makes at least one complete reproduction of programming for every subscriber who has requested a copy of that programming. Thus, if 100 subscribers request that Cablevision copy the same program, Cablevision will make and store 100 separate copies of that program on hard drives in Cablevision's Arroyo servers. (Defendants' Responses to Plaintiffs' First Set of Interrogatories (tab 39) at 5; Blattman Tr. (tab 1) at 182:24-183:14.)

C. How Cablevision Stores Programming in the "RS-DVR" Service

104. As part of the RS-DVR Service, Cablevision will store complete copies of programming on hard drives in Cablevision's Arroyo servers "within Cablevision's head-end facilities". (Budill Ex. 4 (tab 34); Mitchko Ex. 31 (tab 33) at CSC000199; Mitchko Ex. 37 (tab 42) at CSC000034.)

105. The copies of copyrighted programming stored on hard drives in Cablevision's Arroyo servers "will be identical, or substantially similar" to the original copyrighted programming. (Compl. ¶ 21; Answer ¶ 21.)

106. Cablevision has designed the RS-DVR Service to allocate 80 gigabytes of storage per subscriber. (Mitchko Tr. (tab 6) at 45:23-46:13, 295:15-20; Blattman Tr. (tab 1) at 105:4-8.)

107. Cablevision will store copies for up to four individual RS-DVR Service subscribers on each hard drive. (Mitchko Tr. (tab 6) at 47:13-22.)

108. There are no physical partitions that separate the data associated with one RS-DVR Service subscriber from data associated with another subscriber, and the data associated with any one subscriber box does not exist in a contiguous block on the hard drive. (Blattman Tr. (tab 1) at 105:17-106:9, 106:21-107:4.) As a result, a particular segment of a disk could "be allocated to one user one day and a different user another day". (Blattman Tr. (tab 1) at 107:5-9.)

109. If an RS-DVR Service subscriber requests that Cablevision delete stored programming, Cablevision will not affirmatively erase that programming, but rather Cablevision will render the programming unavailable for streaming and will make that space on the hard drive available to be overwritten. (Blattman Tr. (tab 1) at 70:11-71:5, 77:25-78:15.)

110. If an RS-DVR Service subscriber requests that Cablevision record programming and Cablevision is already storing 80 gigabytes worth of data for that subscriber, Cablevision will automatically overwrite the oldest programming that it recorded for that subscriber. That is, Cablevision will manage the programming that it stores for subscribers on a

first-in, first-out basis. (Mitchko Tr. (tab 6) at 116:16-118:2; Mitchko Ex. 10 (tab 54) at CSC001541; Mitchko Ex. 37 (tab 42) at CSC000041.)

D. How Cablevision Transmits Programming in the "RS-DVR Service"

111. When an RS-DVR Service subscriber requests Cablevision to play back stored programming, Cablevision uses the Asset Locator Service to determine where programming is located on the hard drives in Cablevision's Arroyo servers. (Mitchko Ex. 4 (tab 48); Mitchko Ex. 40 (tab 49) at CSC000023-24; Mitchko Tr. (tab 6) at 64:9-18.)

112. The RS-DVR Service "utilizes the same underlying playback engines that currently support VOD". (Mitchko Ex. 31 (tab 33) at CSC000202; Mitchko Tr. (tab 6) at 197:5-18.)

113. Cablevision streams, or transmits, the requested programming in the RS-DVR Service over the allocated bandwidth for the session. (Mitchko Tr. (tab 6) at 73:2-74:14; Mitchko Ex. 40 (tab 49) at CSC000023.)

114. When Cablevision plays back programming from its Arroyo servers to a subscriber as part of the RS-DVR Service, Cablevision transmits the same programming to all set-top boxes in the node of the requesting subscriber. (Mitchko Tr. (tab 6) at 39:2-4 and accompanying errata; Defendants' Responses to Plaintiffs' First Set of Interrogatories (tab 39) at 6.)

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116. Cablevision informs the requesting subscriber's set-top box on which bandwidth the programming is being transmitted as part of the RS-DVR Service so that the set-top box can tune to that bandwidth. (Mitchko Ex. 40 (tab 49) at CSC000024; Mitchko Tr. (tab 6) at 84:17-85:7.)

117. After Cablevision transmits programming as part of the RS-DVR Service, a complete copy of the program that has been transmitted remains stored on a hard drive in the Arroyo servers at Cablevision's head-end. (Defendants' Responses to Plaintiffs' First Set of Interrogatories (tab 39) at 5.) As a result, Cablevision can transmit the programming an indefinite number of times.

118. If a subscriber requests that Cablevision transmit programming as part of the RS-DVR Service and all of the bandwidth allocated to the RS-DVR Service is already being used, Cablevision will not be able to send that programming and the subscriber will get an error message. (Mitchko Tr. (tab 6) at 342:5-343:2, 349:16-23.)

119. A March 27, 2006 article in Multichannel News by Matt Stump entitled "Digital Recording Comes Out of the Box" quoted Tom Rutledge, Cablevision's COO, speaking about the RS-DVR Service, saying that "[t]he VOD Platform lends itself to a variety of uses". The same article attributed the statement "[d]igital recording traffic will look a lot like video-on-demand traffic in a cable network" to Wilt Hildenbrand, Cablevision's Executive Vice President of Engineering and Technology. (Article (tab 52) at 3.)

120. In an engineering document entitled "RS-DVR Design and Architecture Overview", Cablevision originally referred to the RS-DVR Service architecture as "VOD architecture", but subsequently changed the name to "RS-DVR architecture". (Mitchko Ex. 23 (tab 55) at CSC0001647; Mitchko Ex. 40 (tab 49) at CSC000020.) The Cablevision witness was

instructed not to answer, on the grounds of privilege, a question as to whether this change in terminology was based on legal advice. (Mitchko Tr. (tab 6) at 371:17-22.)

121. In an engineering document entitled "RS-DVR Design and Architecture Overview", Cablevision originally referred to the RS-DVR Service network as "the VOD network", but subsequently changed the name to "RS-DVR network". (Mitchko Ex. 23 (tab 55) at CSC001648; Mitchko Ex. 40 (tab 49) at CSC000021.) The Cablevision witness was instructed not to answer, on the grounds of privilege, a question as to whether this change in terminology was based on legal advice. (Mitchko Tr. (tab 6) at 372:19-23.)

122. Cablevision documents state that the RS-DVR Service "will utilize an independent VOD system for storage and playback" and that "[a] new VOD system, provided by Arroyo will be implemented" for that purpose. (Mitchko Ex. 17 (tab 35) at CSC001445; CSC006626-640 (tab 53) at CSC006628.)

123. Cablevision documents state that in designing the RS-DVR Service, Cablevision did "[a]rchitecture modeling and cost analysis with next-generation VOD open platform vendors" such as Arroyo. (Mitchko Ex. 10 (tab 54) at CSC001540.)

124. In designing the RS-DVR Service, Cablevision referred to existing VOD architecture. (Mitchko Tr. (tab 6) at 138:7-139:5.)

125. The Arroyo servers that Cablevision is using for the RS-DVR Service "would be suitable for use in a small VOD system". (Blattman Tr. (tab 1) at 194:25-195:19; Blattman Ex. 5 (tab 56) at Arroyo 000271.)

E. Trick Modes in the "RS-DVR Service"

126. The term "trick mode" refers to the ability to pause, fast-forward or rewind programming. (Mitchko Tr. (tab 6) at 112:18-23.)

127. Cablevision made a decision to create the data required for trick modes in the RS-DVR Service "on the fly" rather than to store separate files for trick modes. (Blattman Tr. (tab 1) at 72:11-15; Mitchko Tr. (tab 6) at 114:2-5, 115:19-116:11.)

128. In order to generate trick modes in the RS-DVR Service, Cablevision creates a buffer of packets of "trick video data" for one to two seconds of video. Those packets of data are streamed to the subscriber when he or she requests a trick mode such as fast-forward or rewind (the "trick mode buffer"). (Blattman Tr. (tab 1) at 72:11-76:9; Mitchko Ex. 21 (tab 57) at CSC001687.)

129. The data used to create trick modes is not destroyed after it is used, but rather is returned to "the pool of free buffer resources". (Blattman Tr. (tab 1) at 76:22-77:5.)

F. Design Features of the "RS-DVR Service"

130. Cablevision chose to design the RS-DVR Service such that the user experience for the RS-DVR Service would "mirror" or "mimic" the user experience for the Scientific Atlanta ("SA") set-top DVR that Cablevision provides to its subscribers. (Mitchko Tr. (tab 6) at 264:4-265:17; Mitchko Ex. 31 (tab 33) at CSC000199; CSC001672-CSC001681 (tab 58) at CSC001673.)

131. Cablevision will provide RS-DVR Service subscribers with the same remote control that it provides to its set-top DVR subscribers. (Mitchko Ex. 37 (tab 42) at CSC000046.)

132. The on-screen menu of programming for the RS-DVR Service will be similar to the on-screen menu of programming that Cablevision's subscribers use on a set-top DVR. (Gottesman Tr. (tab 5) at 65:6-24.)

133. Cablevision's set-top DVR has two tuners, which allows the DVR to record up to two programs at once. (Gottesman Ex. 4 (tab 32) at CSC0011912; Mitchko Tr. (tab 6) at 267:12-25.)

134. In designing the RS-DVR Service, the number of simultaneous records that a subscriber is able to request are limited only by "bandwidth/business decisions". (Gottesman Ex. 4 (tab 32) at CSC011912; Mitchko Ex. 37 (tab 42) at CSC000042.)

135. Cablevision has chosen to design the RS-DVR Service such that Cablevision's software limits the number of simultaneous records that a subscriber can make to two. (Mitchko Tr. (tab 6) at 266:23-270:17; Mitchko Ex. 37 (tab 42) at CSC000042.)

136. Cablevision has "received legal advice regarding limiting the functionality of the RS-DVR Service". (Mitchko Tr. (tab 6) at 285:18-286:3.)

137. Cablevision originally planned to design the RS-DVR Service as a "household storage model", which would allow a subscriber to view transmitted programming from any set-top box in that subscriber's home. (Mitchko Tr. (tab 6) at 288:6-25; Mitchko Ex. 39 (tab 59) at CSC001684.) Cablevision subsequently changed the design of the RS-DVR Service to a "single box storage model", which limits a subscriber to viewing transmitted programming from the set-top box from which the record request was sent. (Mitchko Tr. (tab 6) at 289:2-10; Blattman Tr. (tab 1) at 56:24-57:16.)

138. Cablevision "received legal advice regarding whether to use a household storage model or a single box storage model". (Mitchko Tr. (tab 6) at 291:17-25.)

139. Cablevision intends to change the functionality of the RS-DVR Service in subsequent roll-outs. Cablevision documents state that "Initial development of the product will be completed in 2005 using the SA DVR look and feel and a limited feature set. Later phases of

the project include the addition of new features and a complete redesign of the user interface to optimize the customer experience and revenue potential." (Gottesman Ex. 3 (tab 60) at CSC012261.) Examples of features that Cablevision intends to make available in subsequent roll-out phase(s) include "*IO Smart Suggestions* based on recording habits" and "Genre based suggestion lists. Sign up for the 'New Mother' suggestions and pre-populate your DVR record list with the best baby programming on iO." (*Id.*)

VI. Cablevision Refuses to Take a License for the "RS-DVR Service"

140. In a December 1, 2004 article entitled "Pipers at the Gates of Digital" published on Cable World's website, Mac Budill, Cablevision's Senior Vice President of Programming, was quoted as saying: "An important issue for all of us is the development of a network-based alternative to the in-home DVR experience. With support from our programming partners, we think that we can offer a service to our costumers that, among other advantages, is inexpensive, simple to use, measurable, and ultimately complementary to the interests of copyright holders and programmers." (Budill Ex. 3 (tab 61) at 3.)

141. In 2004, Cablevision engaged in discussions with NBC Universal regarding what it then called a "network personal video recorder" (or "nPVR") service. (Gottesman Tr. (tab 5) at 29:4-9.)

142. Cablevision recognized that it would need a license to distribute programming as part of the proposed nPVR service. (Gottesman Ex. 10 (tab 62) at CSC011493; Gottesman Ex. 15 (tab 63).)

143. Cablevision never agreed with NBC Universal on a license for an nPVR service. (Gottesman Tr. (tab 5) at 163:22-165:5.)

144. On March 21, 2006, Cablevision sent letters to 89 content providers informing them of Cablevision's intended trial and launch of the RS-DVR Service. (Budill Ex. 4 (tab 34); Budill Tr. (tab 2) at 70:12-75:7.)

145. Not a single content provider responded by authorizing inclusion of its programming in the RS-DVR Service. (Budill Tr. (tab 2) at 75:8-76:3.)

146. Turner offered to enter into licensing discussions for the RS-DVR Service, but Cablevision refused. (Budill Tr. (tab 2) at 91:20-93:25; CSC004354 (tab 64).) Cablevision "does not intend to negotiate" with any Turner entity "for new and separate licenses" for the RS-DVR Service. (Answer ¶ 6.)

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Respectfully submitted,

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